

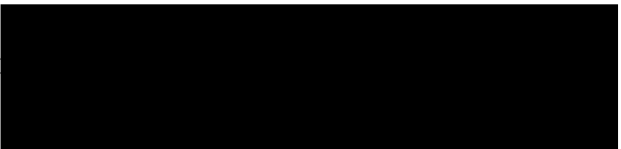
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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

**B9**

ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street, N.W.  
BCIS, AAO, 20 Mass, 3/F  
Washington, DC 20536



File: WAC 01 175 52134

Office: CALIFORNIA SERVICE CENTER

**MAY 28 2003**  
Date:

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in July 1993. It is engaged in the import and export business. It seeks to employ the beneficiary as its executive director/general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity. The director also determined that the petitioner had not established that the beneficiary had been employed for a one-year period in a managerial or executive capacity for the beneficiary's overseas employer. The director further determined that the petitioner had not established the ability to pay the beneficiary the proffered wage of \$36,000 per year.

On appeal, counsel for the petitioner asserts that the director's decision is in error.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -  
- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially stated the beneficiary would gather data and analyze economic trends in the United States and provide this information to the parent company. The petitioner also stated that the beneficiary would attend business conferences and establish relationships with local organizations for the parent company's development abroad. In addition, the petitioner stated that the beneficiary would establish rules and regulations for the company and each position within the company, supervise the annual budget planning and accounting, review reports, and manage the company's capital.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 2000. The tax return did not reflect payment made as compensation for officers or for salaries to employees.

The director requested a more detailed description of the beneficiary's duties for the petitioner, including the percentage of time the beneficiary spent in each of the listed duties. The director also requested the petitioner's organizational chart and a list and brief description of job duties for the employees subordinate to the beneficiary's position.

In response to the director's request, the petitioner, through its attorney, stated that the beneficiary spent 20 percent of his time setting goals of the corporation and advising the parent company on technology products the petitioner could export to China and marketing the products of the parent company in the United States. The petitioner also stated that the beneficiary spent 70 percent of his time directing the management of the corporation including hiring and firing employees, and determining terms of employment. The petitioner noted that it was recruiting a manager to supervise the daily operation of the company and its business. The petitioner also noted that the beneficiary had authority to sign contracts, sales agreements, and other contracts as part of the responsibility of directing the management of the company. The petitioner stated that the beneficiary spent the remaining 10 percent of his time managing the financial aspect of the petitioner. The petitioner noted that it was recruiting an

accountant or financial manager to oversee the financial affairs of the company.

The petitioner also submitted an organizational chart titled, "Projected Framework of [the petitioner]." The chart depicted the beneficiary's position as executive director/general manager and five other unfilled positions. The petitioner also provided its California Form DE-6, Quarterly Wage and Withholding Report for the quarter ending September 30, 2001. The California Form DE-6 showed two employees. The petitioner noted that these two employees were hired in June 2001, after the petition was filed.

The director noted that the petitioner had been established in 1993 and still had only one employee at the time of filing the petition, seven years later. The director determined, because the beneficiary was the petitioner's only employee, the majority of the beneficiary's time would be spent performing the operational tasks of the petitioner. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner states that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or a large enterprise. Counsel asserts that the director failed to consider the evidence presented showing the petitioner had hired two employees after the petition had been filed. Counsel further asserted that the beneficiary could be a functional manager.

Counsel's assertions are not persuasive. Although, counsel is correct in noting that the size of the petitioner is not necessarily determinative of a beneficiary's managerial or executive capacity, the petitioner must still provide evidence of the beneficiary's executive or managerial capacity. The petitioner has failed to provide such evidence. When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Rather than conveying an understanding of the beneficiary's daily tasks, the initial description of the beneficiary's duties paraphrased elements contained in the statutory definition of managerial and executive capacity. See section 101(a)(44)(B)(i), (ii), and (iii), and 101(a)(44)(A)(ii) and (iii) of the Act. In addition, at the time of filing the petition, the beneficiary's duties included performing all the operational tasks of the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner offered no evidence that, when it filed the petition, it used independent contractors or had employees besides the beneficiary. Going on record without supporting documentary

evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner's plans to hire more employees and the actual hiring of two additional employees after the petition was filed are not relevant to the case at hand. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner offered no evidence that the beneficiary managed and controlled a specific function of the petitioner.

The record shows that at the time of filing the petition, the petitioner was an eight-year-old company that claimed to be involved in the import and export business. The firm employed the beneficiary as its executive director/general manager. The record does not contain any information showing that the petitioner employed individuals or used independent contractors at the time the petition was filed. The record does not provide any information on who performs the necessary operational tasks of the petitioner other than the beneficiary. The petitioner has not demonstrated that the reasonable needs of the petitioner are fulfilled by anyone other than the beneficiary performing the petitioner's necessary functions.

Furthermore, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive. The descriptions of the beneficiary's job duties are general and a portion of the position description merely paraphrases the statutory definitions of managerial and executive capacity. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner, therefore, has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established that the beneficiary was employed by the overseas entity in a managerial or executive capacity prior to entering the United States as a nonimmigrant. The petitioner initially stated

that the beneficiary managed the import and export departments for the overseas entity. The petitioner indicated that the two departments had a total of 11 employees. The petitioner stated that the beneficiary supervised and made decisions regarding the daily operations of the departments and also participated in policy-making for the departments.

The director determined that the job description and evidence in the record did not conclusively establish the beneficiary's eligibility as a manager or an executive abroad. On appeal, counsel asserts that the director did not consider the evidence in the record and failed to articulate the deficiencies of the record in her decision.

Counsel's assertion is not persuasive. The director recited the petitioner's description of the beneficiary's duties for the overseas entity and, upon review, found the description insufficient. Neither counsel nor the petitioner provided additional detail on appeal that would further enlighten the Bureau regarding the beneficiary's duties abroad. In addition to providing only a general description of the beneficiary's duties for the overseas entity, the petitioner provided no supporting documentation to establish the number of employees under the beneficiary's supervision. See *Ikea US, Inc. v. INS, supra*. The Bureau cannot conclude from the general description provided that the beneficiary was performing executive or managerial duties for the overseas entity. It appears from the record that the beneficiary may have been a supervisor over 11 employees, but the record does not reflect that the employees were managerial, supervisory, or professional. The record demonstrates only that the beneficiary was a first-line supervisor over non-managerial, non-supervisory, and non-professional employees in his position for the overseas entity.

Further, it appears that the petitioner may be claiming that the beneficiary was engaged in both managerial and executive duties under sections 101(a)(44)(A) and (B) of the Act for the overseas entity. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In sum, the petitioner has not provided sufficient evidence to establish that the beneficiary's duties for the overseas entity were either managerial or executive duties. The record contains insufficient information on appeal to overcome the director's decision on this issue.

The third issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of \$36,000 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has provided only its IRS Form 1120 for the year 2000 to assist the Bureau in determining whether it had the ability to pay the beneficiary the proffered wage. The IRS Form 1120 shows the petitioner had gross receipts in the amount of \$76,000 and a net income of \$2,651.

In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner's net income of \$2,651 is insufficient to demonstrate that the petitioner has the ability to pay the proffered wage. The petitioner has offered no evidence that it has ever paid the beneficiary a salary or other form of compensation in the past. The Bureau must conclude based on the evidence in the record that the petitioner does not have the ability to pay the beneficiary the proffered wage of \$36,000.

Beyond the decision of the director, the record does not support a finding that the petitioner has been doing business for at least a one-year period prior to filing the petition. See 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as follows:

*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm,



corporation, or other entity and does not include the mere presence of an agent or office.

Although the petitioner's IRS Form 1120 for the year 2000 shows gross receipts in the amount of \$76,000, the record contains no invoices or other documentation that demonstrates this sum was earned by the continuous provision of goods and/or services. Although, the record contains a few invoices with November 2000 dates, the record does not contain evidence that the petitioner was engaged in actual business activity prior to that time. As the petition will be dismissed for the reasons cited above, this issue will not be examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.